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In the Supreme Court of the United States

OCTOBER TERM, 1967

No.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

DIXIE HIGHWAY EXPRESS, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (App. A, *infra*, pp. 1a–5a) is reported at 268 F. Supp. 239. An earlier opinion of the district court (App. D, *infra*, pp. 218a–228a) is reported at 242 F. Supp. 1016. The report of the Interstate Commerce Commission on remand (App. C, *infra*, pp. 8a–217a) is printed at 100 M.C.C. 482. The Commission's first report (App. G, *infra*, pp. 234a–249a) is printed at 95 M.C.C. 457.

JURISDICTION

This action was originally brought under 28 U.S.C. 1336, 1398, 2284, and 2321–2325 to set aside an order

of the Interstate Commerce Commission. The final judgment of the three-judge district court (App. B, *infra*, pp. 6a–7a) was entered on May 13, 1967. The United States and the Interstate Commerce Commission filed a notice of appeal on July 14, 1967, and the time for docketing the appeal was subsequently extended by District Judge Cox until October 8, 1967.

The jurisdiction of this Court to review the judgment of the district court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). *American Trucking Associations, Inc.* v. *Atchison, Topeka and Sante Fe Ry. Co.*, 387 U.S. 397; *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1.

STATUTE INVOLVED

Section 207(a) of the Motor Carrier Act, 49 U.S.C. 307(a), provides:

> Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and be-

tween fixed termini, except as such carriers may be authorized to engage in special or charter operations.

QUESTION PRESENTED

The Interstate Commerce Commission found that existing general commodities service to specified points in the South and Southwest was poor and that the public convenience and necessity required the issuance of a motor common carrier certificate to an additional carrier. The district court set aside the Commission's order, holding as a "rule of property" that no new motor carrier service may be authorized until existing carriers have been given an opportunity to improve or correct their service. The question presented is whether certificated motor carriers whose service proves deficient and inadequate to meet public needs are entitled to immunity from new competition until they are afforded an additional opportunity to remedy the deficiencies found.

STATEMENT

On April 28, 1960, Braswell Motor Freight Lines, Inc., a regular route general commodity motor carrier operating between Los Angeles, California, and Memphis, Tennessee, and between Jackson, Mississippi, and New Orleans, Louisiana, filed an application seeking to extend its operating authority east of Jackson, Mississippi, to points in Alabama, Georgia, and Mississippi.[1] More than 30 competing rail and motor carriers

[1] The points included in the application are set out in Appendix A of the Commission's last report (App. C, *infra*, pp. 45a–47a).

and freight forwarders opposed the application. At hearings before a joint board [2] extending over a 14 week period, more than 300 shippers and receivers of freight supported the application.

In its recommended report and order, the joint board concluded that the application should be denied. The Commission (Division 1) disagreed, found that the record demonstrated a public need for much of Braswell's proposed service, and accordingly granted the major part of the application. Following denial of petitions for reconsideration, several competing motor carriers commenced this action to set aside the Commission's order in the district court.

In its first decision (App. D, *infra*, pp. 218a–228a), the district court permanently enjoined the Commission from granting Braswell the approved authority, on the ground that the Commission had failed to make adequate findings to support its decision. The court reasoned that since the Commission had substantially adopted the joint board's findings but had rejected its recommendation that the application be denied, "the board was obliged to state with more than ordinary specificity any contrary finding of facts available to it in this record to influence its decision" (App. D, *infra*, p. 222a). Accordingly, the court remanded the case to the Commission for further proceedings consistent with its opinion (*id.* at 228a).

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[2] Under Section 205(a) of the Motor Carrier Act, 49 U.S.C. 305(a), an application to serve no more than three States must be referred to a "joint board," composed of representatives of the States involved.

On remand, the Commission re-examined the voluminous record in a detailed report (App. C, *infra*, pp. 8a–217a) and again concluded that there was a public need for the service proposed by the applicant. It noted "numerous instances of deficiencies in the existing transportation services experienced by a majority of the supporting witnesses" (*id.* at 18a), including excessive and inconsistent transit times (*id.* at 20a–24a), excessive delays in pickups and deliveries (*id.* at 25a), and excessive handling of perishable or fragile freight in interline service with attendant loss and damage (*id.* at 25a–27a). As a result of such inadequacies, the Commission found that a "significant number of the supporting shippers and receivers have been materially hampered in conducting their respective businesses" (*id.* at 27a), and that this has, "in turn, made it difficult for them to effectively compete in markets they presently serve as well as in markets they are seeking to develop" (*ibid.*).

The Commission found, contrary to the joint board, that shippers had made a serious effort to utilize the services of existing carriers. Numerous complaints about inadequacies in existing services had been registered with at least 30 of the carriers utilized by the shippers and receivers, but to no avail (*id.* at 36a). Existing carriers, the Commission found, "have not demonstrated that they can be depended upon to provide the type of service of which they claim to be capable" (*id.* at 36a), and their overall services "have not measured up to a quality of service that can be classified as reasonably adequate" (*id.* at 37a). The Commission concluded that "the clear and substantial

benefit to the affected shipping and receiving public that would result from making available the improved service here proposed warrants the grant of" Braswell's proposed application for a certificate of public convenience and necessity.

On appellees' motion to enforce the court's prior judgment under the All Writs Statute, 28 U.S.C. 1651, the district court again reversed the Commission. Although not disputing the Commission's findings as to the public need for additional motor carrier service and the deficiencies of existing service, the court below declared, as "a rule of property," that no new motor carrier "certificate affecting the area of another carrier will be issued until that other carrier has been furnished an opportunity either to improve or correct his service to such route or decide whether he wishes to or can furnish the added service" (App. A, *infra*, pp. 3a–4a): Hence, the district court permanently enjoined the Commission "from issuing any certificate of convenience and necessity to the applicant in this case, unless and until the protestants (plaintiffs) are first afforded a reasonable opportunity to furnish such service and either advise the Commission that they do not wish to do so or the Commission finds from experience, after a reasonable opportunity, that they are unable and cannot furnish such service to the public" (App. A, *infra*, p. 5a).

THE QUESTION IS SUBSTANTIAL

By prohibiting the Commission from authorizing new motor carrier service until existing carriers with

inadequate or deficient operations are given a "second chance," over an indefinite future period, to show whether they can provide the transportation service for which they were certificated, the lower court has erected an unjustified barrier to entry into the motor carrier industry—one not countenanced by the Motor Carrier Act, and inconsistent with the National Transportation Policy and the decisions of this Court.

1. To prevent unfair and destructive competition, Congress has chosen to limit entry into the motor carrier industry. S. Rep. No. 482, 74th Cong., 1st Sess. 2; H. Rep. No. 1645, 74th Cong., 1st Sess. 2. The resulting freedom from unrestricted competition, however, does not alter the continuing obligation of certificated carriers to satisfy the shipping needs of their area by maintaining regular and efficient service. Failure by motor carriers to carry out their obligations has prompted the Commission to certificate new service by competing carriers to satisfy public transportation needs. Certification of additional carriers in such circumstances comports with the Commission's mandate to develop "adequate, economical, and efficient service." National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding § 1. This Court has expressly approved the practice, stating that "additional certification is the normal and permissible way to deal with generalized inadequacy in service." *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 166. "The public is entitled to the benefits of improved transportation"; where an applicant proposes a needed transportation service "the Commission may authorize the certificate even though the existing carriers

might arrange to furnish successfully the projected service." *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 70. See, also, *Schaffer Transp. Co.* v. *United States*, 355 U.S. 83, 90-91; *Atlanta-New Orleans Motor Freight Co.* v. *United States*, 197 F. Supp. 364, 370 (N.D. Ga.).

It is, of course, true that the Commission must also consider "the public interest in maintaining a stable transportation industry." *United States* v. *Drum*, 368 U.S. 370, 374. Thus, in the present case, it was required to determine whether the advantages to shippers and the public of additional competition as a means of assuring a more reliable and efficient system of motor carrier transportation in Mississippi, Alabama and Georgia were outweighed by undue competitive disadvantage to existing carriers. See *Interstate Commerce Commission* v. *Parker*, *supra*, 326 U.S. at 67–68 and 69–70; *Schaffer Transp. Co.* v. *United States*, 355 U.S. 83, 90. The balance it struck was manifestly a proper one.[3]

[3] The record clearly demonstrates the inadequacy of existing service (Statement, *supra*, pp. 5–6). Equally, there is no doubt that the additional certification caused no unfair injury to the existing carriers. Indeed, the Commission found little prospect for diversion of traffic as a result of granting the Braswell application. Most of the appellees' own evidence indicated the likelihood of their continued strength and economic stability despite the increase in competition, because Braswell's joint or multiple line arrangements between some of the points appellees serve are less desirable than the single line operations offered by the existing carriers. Moreover, the routes of many of these carriers are more direct, and thus involve less cost to shippers than the single-line operations Braswell hopes to undertake (App. C, *infra*, p. 39a).

Evidence of traffic operations in this commercially expanding area indicated that authorization of new service in the

2. In contrast, the reviewing court's "second chance" theory is patently unsound. The court failed to recognize "that under some circumstances competition operates to stimulate better service and that reasonable competition may be in the public interest" (*Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U.S. 35, 42–43) and that the value of a new competitive operation as an "effective deterrent to future deteriorations in service" (App. C, *infra*, p. 44a) is itself a factor that the Commission may properly consider in determining that a new certificate should be granted, since "one of the weapons in the Commission's arsenal is the right to authorize competition where it is necessary in order to compel adequate service * * *. The conception that the public must wait while the Commission exercises its statutory

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past has itself generated new traffic. Revenue and traffic of existing carriers have not declined as new operations have been authorized (*id.* at 39a–40a). Shipper testimony further revealed the likelihood of abundant use of the new service without the danger of diversions of traffic presently using existing motor carrier services (*id.* at 37a–40a).

Finally, the Commission concluded that appellees Roadway Express, Inc. and Mercury Freight Lines, Inc., carriers operating from Atlanta and Birmingham to points in east Texas, possessed sufficient power to protect their traffic from diversion by Braswell by continuing to offer expedited service over their routes. These two carriers, whose operations had commenced while the Braswell application was pending, were concerned about new competition because of the little time they have had to establish themselves in the area. The Commission found that Roadway and Mercury will not themselves be able to satisfy the quantitative needs of local shippers for efficient service, particularly since their operations are confined to only one portion of the service Braswell proposes to offer (*id.* at 40a–41a).

powers fortified by orders of court, to compel existing carriers to do what they should do, is one which does not commend itself to common sense and the public interest." *Davidson Transfer & Storage Co.* v. *United States*, 42 F. Supp. 215, 219–220 (E.D. Pa.), affirmed *per curiam*, 317 U.S. 587. See, also, *Atlanta-New Orleans Motor Freight Co.* v. *United States*, *supra*, 197 F. Supp. at 370.

And, contrary to the lower court's assertion (App. A, *infra*, p. 3a), neither the Commission nor the courts have ever recognized any "vested property right" which guarantees to an existing carrier whose service is inadequate "an opportunity either to improve or correct his service * * * or decide whether he wishes to or can furnish the added service" (*ibid.*) before a new certificate may be issued to meet the unsatisfied needs of shippers. Such a rule would seriously hamper the improvement of transportation service where the Commission found existing operations inadequate, and frustrate prompt satisfaction of the public's transportation needs in cases in which the Commission has "doubt that the public interest will be adequately served if resumption of service is left to existing carriers." *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241. But also, we stress, a certificate of public convenience and necessity has never been thought to create a vested right to freedom from competition. *Norfolk Southern Bus Corp.* v. *United States*, 96 F. Supp. 756, 761 (E.D. Va.); *North Coast Transp. Co.* v. *United States*, 54 F. Supp. 448, 451–452 (N.D. Calif.), affirmed *per curiam*,

323 U.S. 668; *Inland Motor Freight* v. *United States*, 36 F. Supp. 885, 888–889 (D. Ida.). The Commission was thus fully within its prerogatives in choosing the remedy of competition for the inefficient transportation provided by the existing carriers.

CONCLUSION

Probable jurisdiction should be noted and the judgment below reversed.

Respectfully submitted.

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